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中国境内企业境外间接上市的
法律监管问题初探

Preliminary Study on the Legal Issues of Regulation
on Oversea Indirect Listing of Domestic Enterprises

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内容摘要

近年来，企业境外间接上市在我国发展异常迅速。由于这种上市方式绕过了我国相关法律制度的约束，给我国金融秩序带来了巨大的冲击，因而引起了理论和实务界的高度关注。本文就以境外间接上市监管的法律问题为研究中心，采用分类、比较和归纳的法律研究方法，从多角度对境外间接上市法律监管制度作了较为深入的分析，重点在于探讨我国对境外间接上市法律监管的现状及其完善。全文分为引言、正文和结论三部门。正文分为五章：

第一章是境外间接上市的概述。首先简单介绍了境外间接上市的定义、原因和运作模式，通过分析其对我国的影响，指出我国有必要对其进行监管，并进一步论证了应对其进行监管的主体，引发了下文对境外间接上市多层次监管的分析。

第二章专门论述对境外间接上市的证券监管。首先分析了证券监管的目的，即：减少我国金融制度风险，防止国有资产流失，协助境外监管机构保护境外投资者及维护境外证券市场的公正、有效、透明。之后，文章回顾了我国对境外间接上市证券监管方式的演变。其中，着重介绍了“无异议函”方式的产生和消亡过程及其性质。在此基础上，提出了若干完善我国现有境外间接上市证券监管制度及加强与境外监管机构合作的建议。

第三章专门论述了对境外间接上市的外汇监管。首先分析了境外间接上市外汇监管的内容，指出无非是对相关的资本出入境进行监管，进而回顾了我国历年来对境外间接上市相关的资本出境和入境两个层次的外汇监管制度，并提出了相关的完善建议。

第四章专门论述对境外间接上市中返程投资的法律监管。首先分析了返程投资的定义、模式及其危害，回顾了我国对境外间接上市返程投资监管实践的发展，进而提出相关完善境外间接上市返程投资监管制度之建议。

第五章从“假外资”，股权、股息与税收问题，员工股票期权问题三个角度简单论述了对境外间接上市的税务监管。

关键词：境外间接上市；证券监管；外汇监管

ABSTRACT

Recent years, Chinese enterprises' overseas indirect listing develops very quickly. Because this kind of listing evades the regulation of domestic law, it challenges our financial regulation system and attracts high attention from all circles. This dissertation focuses on the legal issues arising from regulation on indirect cross-border listing. Research methods such as taxonomy, comparison and induction have been used to analyze the system of regulation on indirect cross-border listing from several respects. The emphasis is how to perfect our country's regulation system. The thesis contains five chapters in addition to Introduction and Conclusion.

Chapter 1 is a brief introduction of overseas indirect listing. It first introduces the concept, causes and different layouts. Then analyzing its impact on our country, it points out that our country should strengthen its regulation on overseas indirect listing. The end of Chapter one discusses the supervision authorities, which guides the analysis following.

Chapter 2 deals with the security supervision on overseas indirect listing. First, it analyzes the supervision objects and reviews the development history and present situation of security supervision with emphasis on no-action letter. Then based on this analysis, the author proposes some suggestion on how to perfect the system of security supervision on overseas indirect listing and how to seek cooperation from overseas supervision authorities.

Chapter 3 deals with the foreign exchange management of overseas indirect listing. The content of supervision is discussed first, which shows that supervision on relative capital inflow and outflow in the process of overseas indirect listing is enough. Then the author studies the supervision from these two respects.

Chapter 4 deals with the legal regulation on round-trip investments in the progress of overseas indirect listing. First it analyzes the definition, layouts and impact of round-trip investments. Then the author looks back on development history of domestic supervision on it and gives comments on the way we used to regulate it, which the suggestion proposed at last is based on.

Chapter 5 discusses the tax supervision on overseas indirect listing from three

respects: One is tax for the inveracious FDI; another is issues on stock, dividend and tax in and after oversea indirect listing; the other is tax for employee stock option.

Key Words: Oversea Indirect Listing; Security Supervision; Foreign Exchange Administration

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缩 略 语 表

Abbreviations

BVI (British Virgin Island)	英属维尔京群岛
CFC (Controlled Foreign Corporation)	受控外国公司
FASB (Financial Accounting Standards Board)	美国财务会计准则委员会
FDI (Foreign Direct Investment)	外商直接投资
IOSCO (International Organization of Securities Commissions)	国际证券委员会组织
IPO (Initial Public Offering)	首次公开发行
MOUS (Memorandum of Understanding)	谅解备忘录
MLATS (Mutual Legal Assistance Treaties)	司法互助协定
SPE (Special Purpose Entity)	特殊目的实体
SPV (Special Purpose Vehicle)	特殊目的公司
VIE (Various Interest Entity)	可变利益实体

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引 言

中国企业境外上市是从间接上市开始的。早在 1984 年,香港中银集团与华润集团组合成新琼企业有限公司,收购香港证券交易所上市公司康力公司 34.8% 的股份,揭开了中国企业收购海外上市公司进行重组取得上市地位的序幕。进入 90 年代,尽管中国证券市场建立了旨在引进外资的 B 股市场,并直接到香港证券市场招股上市,中国企业境外间接上市节奏却并没有减慢或停止,其中尤以在香港上市的红筹股为典型,已经被看作是“中国证券市场国际化的一个重要的具体表现,是中国企业为了更有效地利用外资而采取的积极举措”。^①近年来,随着非公有制经济的发展,企业境外间接上市在我国掀起一阵高潮,大批知名的境内企业(尤其是民营企业和高科技企业)纷纷通过在国际著名的离岸金融中心设立壳公司,然后通过并购、重组等一系列的运作,将境内资产或权益装入壳公司,在境外资本市场寻求发行上市。

与境外直接发行上市不同的是,间接上市是以境外公司的名义进行的,但就效果而言,两者异曲同工,都为大陆筹集到可观的资金。境外间接上市更是解决了不少民营企业和高科技企业后续资金发展不足的问题,促进了我国非公有制经济和高科技产业的发展。

然而与到境外直接发行上市,国内已有完善的规范不同的是,对于境外间接上市我国目前还缺乏公开、透明的法律保障和规范。中外投资者权益得不到充分保护,资本流出入也面临一定的障碍,运营成本比较高。而且,形成一部分对外投、融资游离于我国现行统计监督体系之外,不利于全面掌握我国对外资产负债状况和准确预测我国涉外经济形势。同时,也容易引发企业权益流失、资本违规外逃等问题。随着谋求境外间接上市的境内企业日渐增多,对间接上市活动进行合理的监管已显得十分急迫。

与此同时,我国有关的法律法规却存在着诸多缺漏,监管机构在进行监管时还存在较多薄弱环节。2005 和 2006 年,有关监管机构认识到了这一问题,迅速加紧了对境外间接上市的监管。商务部、发改委、外管局先后出台了对境外间接

^① 邱永红. 红筹股法律监管问题初探 [J]. 亚太经济, 1998, (8): 73.

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